United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1690

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

CHARLES A. SCHICKE, ET ALS
Plaintiffs-Appellants,

v.

JAMES T. LYNN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, GEORGE ROMNEY AND THE CITY OF NORWALK
Defendants-Appellees.

U. S. District Court, District of Connecticut,
Civil No. B-169

U.S. Circuit Court of Appeals, Second Circuit,
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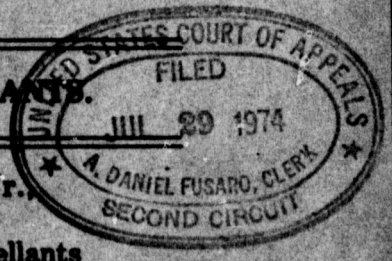
On Appeal from the United States District Court
for the District of Connecticut



BRIEF OF PLAINTIFFS-APPELLANTS.

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ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in entering summary judgment for all defendants on the ground that there was "ample evidence" regarding the applicable comprehensive plan in the administrative record when Secretary of Housing and Urban Development George Romney approved the conversion-substitution of the subject open-space land in Norwalk, Connecticut?

II. Whether, therefore, the District Court erred in failing to enter summary judgment in favor of the plaintiffs on the ground that there was no question of material fact that the decision maker, Secretary Romney, did not have and could not have any knowledge of the applicable comprehensive plan from the administrative record?

III. Whether the District Court erred in failing to compel the requested deposition of former Secretary Romney and in entering summary judgment for all defendants, when only the present Secretary of Housing and Urban Development had moved for such?

STATEMENT OF THE CASE

Preliminary Statement

This is the second appeal taken to this Court by the plaintiffs from the entry of summary judgments in favor of the defendants by the District Court for the District of Connecticut (Blumenfeld, C.J.). The present appeal is taken from the March 26, 1974 order (Document No. 73, Index to Record on Appeal, hereinafter Doc. 73) of the District Court (Blumenfeld, C.J.) granting a renewed Motion for Summary Judgment of the Secretary of Housing and Urban Development (HUD) James T. Lynn and the Judgment of April 3, 1974 (Doc. 74) entering judgment in favor of all defendants, i.e., Secretary Lynn, former Secretary of Housing and Urban Development George Romney and the City of Norwalk.

In conjunction with the appeal from the entering of the summary judgment, it is relevant and, respectfully submitted, required for this Court to review the failure of the District Court to rule on the plaintiffs' Motion for Summary Judgment, Motion for Order Compelling Attendance at Deposition and Motion for Default and Motion to Stay (Doc. 70, 71 and 72 respectively), as well as the federal defendant's Motion for Protective Order (Doc. 69).

The District Court previously entered summary judgments in favor of the defendants on May 3, 1972 (Doc. 44). **Schicke v. United States**, 346 F. Supp. 417 (D. Conn. 1972). On the previous appeal of the plaintiffs, this Court reversed and remanded the case to the District Court for further proceedings consistent with its opinion, which narrowed the issues raised in the first appeal to one issue. **Schicke v. Romney**, 474 F.2d 309, 319 (2nd Cir. 1973).

Factual Background

This is now a class action by 48 plaintiffs to declare invalid and illegal the conversion, to a state community college campus, of 43 acres of park land, acquired and dedicated by the City of Norwalk as open space land, under the Open-Space Land Program of the Housing Act of 1961, as amended, 42 U.S.C. 1500-1500e (1964 ed., Supp. V). This action also seeks to enjoin the Secretary of Housing and Urban Development from approving the pending application of the City of Norwalk to convert 14 additional acres for the college site and to enjoin the City from conveying any portion of the open space land to the State of Connecticut for the college campus.

The open space land in question is a portion of a 196-acre parcel, commonly called the Gallaher Estate, acquired by the City of Norwalk in November 1965 for park purposes at a cost of $1.5 million. Pursuant to an application under the Federal Open-Space Land Program, 42 U.S.C. 1500a(a), the Department of Housing and Urban Development reimbursed the City in January, 1967 for the maximum amount permitted, 50 per cent, or $750,000.00, of the purchase price. The State of Connecticut, under a similar open-space program, also reimbursed the City for 25 per cent of the cost, or $375,000.00, leaving the City to absorb the remaining 25 per cent.

Although there is evidence in the administrative record (Doc. 11) that conversion plans were made even before the open-space land was purchased, in late 1967 the City of Norwalk formally initiated plans to withdraw 57 acres of this property from its open-space designation and dedication, in order that this acreage could be used as part of the proposed campus site of the Norwalk Community College, a regional, two-year state college, the location of which in Norwalk was a source of some pride to the reigning city administration.

However, due to the statutory restrictions which came with the federal funds, the land could not be converted to other uses by the City or State, without the express approval of the Secretary of Housing and Urban Development. Section 1500c provided, at all times relevant to this case, as follows:

> No open-space land for the acquisition of which a grant has been made under this Chapter shall, without the approval of the Secretary, be converted to uses other than those originally approved by him. **The Secretary shall approve no conversion of land from open-space use unless he finds** (1) that such conversion is essential to the orderly development and growth of the urban area involved and (2) it **is in accord with the then applicable comprehensive plan**, meeting criteria established by him. The Secretary shall approve any such conversion only upon such conditions as he deems necessary (3) to assure the substitution of other open-space land of at least equal fair market value and (4) of as nearly as feasible equivalent usefulness and location. (Emphasis and numbers added.)

The City, therefore, in an attempt to fulfill the condition of the statute, applied to HUD to substitute 29.9 acres of other recently acquired city property, commonly known as the Taylor Farm, for the 57 acres which it wished to withdraw from the open-space property of the Gallaher Estate. During the pendency of its conversion-substitution application to HUD, the City dropped 14 acres of the Gallaher property from its conversion request.

Pursuant to the modified application, on November 10, 1969, HUD Secretary George Romney approved the conversion of 43 acres of the open-space land in the Gallaher Estate property for the requested community college purpose and also approved the substitution therefor of

the 29.9 acres of the Taylor Farm, which was located approximately 6 miles from the open-space land of the Gallaher Estate (Doc. 11). At the time of his approval of the conversion-substitution, the Secretary made no formal findings whatsoever.

The plaintiffs, as persons aggrieved by the Secretary's approval of the conversion-substitution, brought this action based on the (summarized) claims that (1) Secretary Romney did not personally make the four determinations required by Section 1500c prior to approval of the conversion-substitution; (2) that he did not consider the relevant factors when making his decision, and (3) that his decision in approving the conversion-substitution was therefore arbitrary, capricious, an abuse of discretion and not in accordance with the applicable law as set forth in Section 1500c.

District Court Proceedings

The significant developments in the District Court prior to, and subsequent to, the first appeal in this case revolved around the sufficiency of the administrative record to support the conversion-substitution decision of the Secretary, since the sufficiency of the record was the central issue in the repeated Motions for Summary Judgment of the federal defendants. In addition, there was some re-alignment of parties when then HUD Secretary, George Romney, was joined as a party defendant on January 8, 1971 and the United States and the State of Connecticut were dropped as parties on May 25, 1971. (Docs. 29-31.) The District Court had previously granted the application of twenty-two other adjacent property owners to intervene in the action as additional plaintiffs.

The District Court twice (May 25, 1971 and October 7, 1971) reserved decision on the federal defendant's initial Motion for Summary Judgment and finally denied the

motion on November 24, 1971 (Doc. 38), on the ground that the administrative record and the documentary evidence filed by the federal defendant left in doubt whether the Secretary had made the determinations required under Section 1500c. In order to remedy the patent defects of the administrative record (Doc. 38, p. 6), and at the express suggestion of the District Court (Doc. 38, p. 7), the federal defendant on January 24, 1972 filed what were purported to be the formal findings of Secretary Romney when he made his decision of November 10, 1969. These findings, entitled "Determination of the Secretary Upon Application for Conversion of Open-Space Land", were dated January 11, 1972, some 26 months after the actual decision and were filed with yet another renewed Motion for Summary Judgment (Doc. 39).

In response to the filing of the Secretary's "Determination", the plaintiffs noticed the deposition of the Secretary, which notice resulted in a Motion for Protective Order filed by counsel for Secretary Romney. The City of Norwalk also moved for summary judgment, relying completely on the federal defendant's motion and supporting documentary evidence. Over the formal objections of the plaintiffs, the District Court heard arguments on both the Motion for Protective Order and the Motions for Summary Judgment on April 10, 1972 and in its decision of May 2, 1972 (Doc. 44), the District Court granted all three motions of the defendants and entered final judgment in favor of the defendants on June 14, 1972. See **Schicke** v. **United States**, 346 F. Supp. 417 (D. Conn. 1972).

First Appeal

The plaintiffs appealed from the decision of the District Court, which appeal was argued before this Court (Lumbard, Smith and Mansfield, Js.) on December 8,

1972 and decided on February 20, 1973. **Schicke v. Romney**, 474 F.2d 309 (2nd Cir. 1973).

In its decision this Court reversed and remanded the case to the District Court based on one fundamental defect in the case of the federal defendant — that the administrative record failed to show that the Secretary had followed the mandate of Section 1500c in certifying that the conversion-substitution was consistent with any comprehensive plan which the City of Norwalk might have had at the time. **Schicke v. Romney**, supra, at 315. This Court therefore directed the District Court, on remand, to determine whether the Secretary had complied with the statutory mandate with respect to the local comprehensive plan. **Id.**, at 319. This Court added that it saw no objection to the plaintiffs taking the deposition of the Secretary if that was found necessary to determine whether the Secretary had obeyed the statute regarding the comprehensive plan. **Id.**

District Court Proceedings After Remand

Following remand, the plaintiffs proceeded to pursue the reasonable discovery to which this Court held they were entitled. **Schicke v. Romney**, supra, at 319. On April 5, 1973, the plaintiffs again filed notice of their intention to depose former Secretary Romney and filed lengthy interrogatories directed both to former Secretary Romney and the City of Norwalk, which was also requested to produce certain documents. (Docs. 52, 55, 54 and 56, respectively.) The federal government countered with a Motion to Substitute the new Secretary of Housing and Urban Development, James T. Lynn, for former Secretary Romney, who had resigned his position during the pendency of the first appeal. The District Court denied the request for substitution, but merely added Secretary Lynn as a party on May 8, 1973. (Doc. 58.)

On May 18, 1973, before complying with the outstanding interrogatories filed by the plaintiffs, the federal defendant filed a third Motion for Summary Judgment and a Motion for Protective Order, to stay all discovery directed towards former Secretary Romney (Doc. 60). These motions were supported by an affidavit by a hitherto unknown and unmentioned HUD official, one Bernard I. Levine, who claimed to have been the Assistant Director for Planning for the New York regional office of HUD in 1968 and 1969, as well as by certain exhibits (Doc. 61 and Exhibits A-D, I-III).

In order to prevent the federal government from bypassing discovery once again, the plaintiffs moved for an order compelling Secretary Romney to comply with the filed interrogatories and also filed a formal statement, affidavit and memorandum of law in opposition to the federal defendant's motions (Docs. 62, 63). At the motion calendar of May 29, 1973, the District Court ordered the defendants to answer the plaintiffs' pending interrogatories and took no action on the federal defendant's Motion for Summary Judgment.

On August 31, 1973, the federal defendant finally filed the answers to the plaintiffs' interrogatories (Doc. 64) and on October 5, 1973, the federal defendant filed a Supplemental Affidavit of Bernard I. Levine (Doc. 61). The City of Norwalk filed its answers to the interrogatories directed to it on October 26, 1973 (Doc. 67). Due to the inconclusive nature of the answers to the interrogatories, the plaintiffs once again noticed the deposition of Secretary Romney, this time for January 18, 1974.

In response, the federal defendant re-claimed his Motion for Summary Judgment and Motion for Protective Order on January 9, 1974. The plaintiffs on January 24, 1974 filed their own Motion for Summary Judgment (Doc. 71) on the grounds that the documentary evidence

filed to date demonstrated that there was no question of fact that former Secretary Romney failed to comply with the statutory mandate of Section 1500c with respect to the comprehensive plan determination and in fact made no such determination when he approved the conversion-substitution on November 10, 1969.

The plaintiffs also moved again for an order compelling the attendance of Secretary Romney for a deposition at a date, time and place to be mutually agreed upon by counsel (Doc. 71), and further moved to stay proceedings (Doc. 72) on the federal defendant's Motion for Summary Judgment and Motion for Protective Order until after the deposition of former Secretary Romney was taken.

After the filing of briefs and an abbreviated argument on the cross motions for summary judgment, the District Court (Blumenfeld, C.J.) by a Memorandum of Decision of March 26, 1974 (Doc. 73) entered judgment for all defendants, apparently in response to the Motion for Summary Judgment filed only by the federal defendant, the present Secretary, James T. Lynn. The Court did not rule, nor even comment on the various motions of the plaintiffs. The decision of the District Court was apparently based on its opinion (Doc. 73, p. 9) that "there was ample basis for the determination of the Secretary (Romney) that Norwalk did have a 'comprehensive plan' and that the 'package' which was in the record before him adequately disclosed it" and therefore held, at p. 10 of its memorandum, "that in approving the City of Norwalk's application for conversion of the open-space land which is the subject matter of this action, the Secretary had before him ample evidence that the conversion was in accord with Norwalk's comprehensive plan."

ARGUMENT

I. The District Court Erred In Entering Summary Judg-

ment On The Ground That There Was No Question Of Material Fact That There Was Ample Evidence In The Administrative Record Before Secretary Romney Regarding The Comprehensive Plan.

As noted, the basis for the District Court entering summary judgment was the finding that Norwalk did have a series of documents which constituted the required comprehensive plan and that this plan was adequately disclosed in the administrative record and therefore Secretary Romney had before him ample evidence that the conversion was in accord with this comprehensive plan. Memorandum of Decision (Doc. 73), at pp. 9-10. The District Court obviously made this determination based on the original Affidavit of Bernard I. Levine (Doc. 61), dated April 18, 1973, and the exhibits filed therewith on May 18, 1973 (Exhibits A-D, I-III), as well as the Supplemental Affidavit of Bernard I. Levine (Doc. 61), dated September 17, 1973 and filed on October 5, 1973. **Id.**

It is necessary to stress that Secretary Romney's decision approving the conversion-substitution was dated November 10, 1969. (This "decision" consisted of the Secretary merely signing a Memorandum from Samuel C. Jackson, dated October 10, 1969, contained in Document 11 of the Record.) It should also be noted that the alleged formal findings of Secretary Romney, prepared as a result of this litigation, are contained in his "Determination" (Doc. 39), which is dated January 11, 1972. In other words, the actual decision was dated November 10, 1969, the **ex post facto** formal findings in the "Determination", which this Court found insufficient regarding the comprehensive plan, **Schicke v. Romney**, supra, at 317, were dated January 11, 1972, more than two years after the decision, and the affidavits of Bernard I. Levine were dated April 18, 1973 and September 17, 1973, almost four years after the decision.

At the outset, therefore, the plaintiffs submit that the actions of the Department of Housing and Urban Development constitute a flagrant example of **ex post facto** amendment of an administrative record by a series of "**post hoc** rationalizations", after the actual decision of November 10, 1969. Such "**post hoc** rationalizations" are highly suspect and traditionally have been found to be an inadequate basis for review by the courts. **Citizens to Preserve Overton Park, Inc. v. Volpe**, 401 U.S. 402, 419 (1971), hereinafter **Overton Park**. Such rationalizations are obviously suspect because, by their very untimeliness, they are the product of something far less than total recall of the facts and considerations at the time of the decision in question. "Agency Fact-Finding Under the Open-Space Land Program — **Schicke v. Romney**," **Second Circuit Review**, 40 Brooklyn L. Rev. 857, at 865 (1974), hereinafter **Second Circuit Review**, Brooklyn L. Rev. One other fact must be stressed at this juncture — that under Section 1500c only the Secretary of Housing and Urban Development was delegated the authority by Congress to make the finding that a proposed conversion was in accord with the applicable comprehensive plan and that only the Secretary had the authority to ultimately approve any conversion. As this Court has stated, the Secretary was obliged personally to approve this conversion under the statutory language. **Schicke v. Romney**, supra, at 314; 42 U.S.C. 1500c; see 31 Fed. Reg. 7358 (1966); see also Affidavit of Dwight F. Rettie, dated October 5, 1970, Par. 3, (Doc. 10).

This Court has previously decided that the administrative record, including the items relied upon by the Secretary in his "Determination" of January 11, 1972, and the "Determination" itself, were insufficient to uphold the decision that the conversion-substitution was in accord with the applicable comprehensive plan. **Schicke v. Romney**, supra, at 315, 317, 319.

Therefore, the crucial question is whether the affidavits and accompanying exhibits of Bernard I. Levine, the veracity of which is not conceded, filed almost four years after the decision, are to be permitted to fill the complete void in the administrative record and in the Secretary's potential knowledge at the time he made his decision. The plaintiffs submit that common sense, justice and the law require that these "**post hoc** rationalizations" should not be accorded such a retroactive effect. The basis for this contention is simply that it is patently impossible for the sole decision maker, Secretary Romney, to have made a non-arbitrary decision on the comprehensive plan aspect, when the administrative record before him was silent on the matter and when therefore it was impossible for him to have any knowledge of what Mr. Levine claims, almost four years later, to have done regarding the comprehensive plan requirements. Therefore, the plaintiffs respectfully submit that the District Court erred in finding that the affidavits of Mr. Levine indicated that Secretary Romney had ample evidence before him when he decided, since none of the information in the affidavits was shown to have been known by the Secretary and furthermore, since the conclusory, passing references to the comprehensive plan in the administrative record have already been held to be insufficient to support the decision on the comprehensive plan by this Court. **Schicke v. Romney**, supra, at 315, 317.

The claims contained in the affidavits of Mr. Levine that he made an investigation of the purported comprehensive plan and found it in accordance with the conversion application are distinguishable from the dicta of this Court requiring, at least, members of the department to be thoroughly familiar with the comprehensive plan. **Schicke v. Romney**, supra, at 316, 317. While Mr. Levine claims to have made the required study of the comprehensive plan, it was still incumbent on Secretary Romney to have considered the results of Mr. Levine's alleged

study in reaching his decision. It follows, therefore, that before Secretary Romney could have reached his decision on the comprehensive plan aspect, it was necessary for the information to have been brought to his attention. The affidavits of Mr. Levine do not show that this alleged study was ever brought to the attention of the Secretary, before he made his decision. Thus, the alleged study of the purported comprehensive plan by employees, including Mr. Levine, is meaningless, since there is nothing in the record to indicate that Secretary Romney had any knowledge of this study, not even in his **ex post facto** findings filed in January, 1972.

The plaintiffs submit that on the remand they had the right to trial on the issues of whether the requisite comprehensive plan did exist before the Secretary's decision, whether the purported comprehensive plan was sufficiently brought to the attention of Secretary Romney and ultimately whether sufficient evidence existed to show that Secretary Romney could have reasonably found that the conversion-substitution was in accordance with the comprehensive plan.

As noted previously, the Supreme Court has recently once again criticized the use of **post hoc** rationalizations contained in litigation affidavits, **Overton Park**, supra, at 419, relying on the established law regarding such rationalizations as contained in such cases as **Burlington Truck Lines, Inc. v. United States**, 371 U.S. 156 (1962) in which the Court stated the following, at 168-69:

> **The courts may not accept** appellate counsel's **post hoc rationalizations for agency action**; the rule in **Chenery (S.E.C. v. Chenery Corp.**, 332 U.S. 194, 196 (1947) requires that an agency's discretionary order be upheld, if at all, **on the same basis articulated in the order by the agency itself** . . . (Emphasis added.)

Furthermore, as the Court held in **Overton Park**, supra, at 419-420, such **post hoc** affidavits clearly do not constitute the administrative record, but it is only the "full administrative record that was before the Secretary at the time he made his decision" which must be reviewed.

To the plaintiff, it is obvious that the complete silence in the administrative record on the comprehensive plan determination, followed by the subsequent claims of Mr. Levine in his affidavits, indicates that Secretary Romney did not follow the statutory mandate of Section 1500c regarding the comprehensive plan. The Circuit Court of Appeals for the Tenth Circuit has expressly criticized the use of affidavits, as in the present case, if such affidavits claim to add significant, new material evidence regarding an administrative decision. In **Garvey v. Freedman**, 397 F.2d 600, 610-611 (1968), the Court stated:

> Discrepancies between administrative record facts and the affidavit addenda on judicial review, if indeed there be such, may very well support the contention that the administrative determinations were not made in conformity with the regulations erected for the purpose of insuring due process. Moreover, factual determinations are not final and conclusive unless relevantly supported by the record — an administrative order without factual support is without due process. (Citation omitted.)
>
> This not a **de novo** review. The integrity of the administrative process must be judged by what took place in the administrative proceedings **as reflected on the administrative record unaided by affidavit proof in a reviewing court.** (Emphasis added.) See **N.B.C. v. United States**, 319 U.S. 190, 227 (1943); **United States v. Bianchi & Co.**, 373 U.S. 709, 720-21 (1963); **Tagg Bros. & Moorhead v.**

United States, 280 U.S. 420, 444 (1930).

It would be amusing if it were not so serious, that the federal defendant could not even incorporate all of the **post hoc** rationalizations in the first affidavit of Mr. Levine, but was required to file a supplemental affidavit some five months later, in order to attempt to further rationalize and justify the decision at issue.

Based on the facts in this case, as well as the authority cited, the plaintiffs re-submit that the **post hoc** affidavits of Bernard I. Levine cannot be allowed to retroactively amend the administrative record and the Secretary's lack of knowledge of the comprehensive plan.

The foregoing arguments and authority apply with equal force and effect to the preliminary finding of the District Court that the City of Norwalk did have a comprehensive plan which met the requirements of Section 1500c, which plan the District Court held was "adequately disclosed" in the administrative record. Memorandum of Decision (Doc. 73), at p. 9. This Court defined the general requirements of such a comprehensive plan, based on the legislative history, in its first opinion. **Schicke** v. **Romney**, supra, at 315-16. The District Court's finding that the comprehensive plan was "adequately disclosed" in the administrative record is completely contrary to the holding of this Court following its inspection of the administrative record, **Schicke** v. **Romney**, supra, at 317:

> Nowhere in the documents submitted to the District Court is there a copy of any comprehensive plan, a statement of what the plan contains, or a reference to where it is to be found.

This Court further held, at 317, that without the comprehensive plan itself and "the Secretary's detailed

findings with respect to it," it was unable to decide whether Norwalk even had a plan which fulfilled the requirements of the statute. The plaintiffs submit that Mr. Levine's affidavits and exhibits do not meet the conditions set by this Court, since they attempt to retroactively amend the administrative record and since they do not contain the Secretary's detailed findings on the comprehensive plan. In the answers of the federal defendant to the plaintiffs' interrogatories (Doc. 64), it was expressly admitted in Answer 1(c) that "Secretary Romney did not personally inspect any of the documents" subsequently alleged to comprise the comprehensive plan. It should further be noted that in none of the answers to the interrogatories is it claimed that Secretary Romney ever had any personal knowledge of the comprehensive plan whatsoever.

Once again, therefore, the plaintiffs submit that the affidavits and exhibits filed by Bernard I. Levine cannot be permitted to retroactively construct a comprehensive plan in the administrative record which existed on November 10, 1969, when the Secretary approved the conversion-substitution, nor can they retroactively give the Secretary knowledge that he did not have and had no way of having regarding the comprehensive plan. Thus, whether the documents filed in May of 1973 did constitute a proper comprehensive plan is irrelevant to the adequacy of the Secretary's decision, since neither the documents nor any explanation of the alleged plan were present in the administrative record or known by Secretary Romney when he made his decision on November 10, 1969.

Therefore, based on all of the foregoing facts, arguments and authority, the plaintiffs respectively submit that the District Court erred in finding that there was ample evidence in the administrative record, when Secretary Romney decided, that there was a proper com-

prehensive plan and that the conversion was in accord with such plan. Based on this contention, the plaintiffs therefore respectfully submit that the District Court erred in entering summary judgment in favor of the federal defendant.

II. The District Court Erred In Failing To Find There Was No Question Of Fact That Secretary Romney Failed To Follow The Statutory Mandate And Therefore Erred In Not Entering Summary Judgment In Favor Of The Plaintiffs.

The proper standard of review for informal agency actions, such as the present decision of Secretary Romney, was set forth by the Supreme Court in the **Overton Park** case, supra, 401 U.S. 402, 415-16 (1971). This standard of review is based on Section 706 of the Administrative Procedure Act (5 U.S.C. 706, 1964 ed., Supp. V), which requires the reviewing court to engage in a substantial inquiry, which in the present case required the District Court to conduct a thorough, probing, in-depth review of Secretary Romney's decision. **Id.**, also **Schicke v. Romney**, supra, at 315. Even if it is found that the Secretary's action was within the scope of his statutory authority, Section 706 (2) (A) requires the reviewing court to make a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." To make this finding one must consider whether the decision was the result of a complete consideration of the relevant factors, based on the full administrative record which was before the Secretary and from which his decision was made. This Court, in the previous appeal, adopted the standards of **Overton Park** and held that those standards were applicable to this case. **Schicke v. Romney**, supra, at 315.

The plaintiffs submit, therefore, that under the applicable standard of review, it was impossible for the Dis-

trict Court to have found that Secretary Romney considered the relevant factors regarding the comprehensive plan, since it is undisputed that the record was devoid of any meaningful discussion of the comprehensive plan and since it is admitted that Secretary Romney had no personal knowledge of the comprehensive plan. Although **de novo** review is not authorized under the standard of review set forth in **Overton Park, Schicke v. Romney**, supra, at 315, the plaintiffs respectfully submit that the District Court actually engaged in **de novo** review since it read the affidavits of Mr. Levine, which were filed almost four years after the decision, as if all of the information contained therein was actually before the Secretary when he decided. This, in effect, amounted to the substitution of the District Court's judgment for the judgment required of Secretary Romney. In other words, the District Court appears to have decided that **if** Secretary Romney knew about the information in Mr. Levine's affidavits, he certainly would have decided that the conversion was in accord with the comprehensive plan.

The plaintiffs submit that the District Court, pursuant to Section 706 (2) (A) should have held the Secretary's action "unlawful" and set it aside, since it was arbitrary and not in accordance with Section 1500c. Since the facts established that the Secretary did not have, nor could not have had, any knowledge regarding the comprehensive plan, his decision on that aspect must by definition have been arbitrary, since it was without a rational basis, and since the Secretary thus did not follow the mandate of Section 1500c.

The plaintiffs set forth these contentions in their Motion for Summary Judgment (Doc. 70) and in their accompanying Memorandum of Law. Nevertheless, the District Court chose to completely disregard the plaintiffs' Motion for Summary Judgment, although the plaintiffs now reiterate their contentions that the record of

this case conclusively shows that there is no question of fact that Secretary Romney failed to follow the mandate of the conversion statute with respect to the comprehensive plan determination. The fact that regional staff employees now claim to have made a detailed study of the comprehensive plan does not controvert the fact that Secretary Romney had no knowledge of this comprehensive plan when he made his decision. Without such knowledge, Secretary Romney clearly violated Section 1500c and therefore the District Court erred in not finding that the Secretary's decision on the comprehensive plan was arbitrary, capricious and not in accordance with the conversion statute.

III. The District Court Erred In Not Permitting The Plaintiffs To Depose Former Secretary Romney And In Entering Judgment For All Defendants.

As stated, the plaintiffs contend that summary judgment should not have been entered in favor of the federal defendant, but should have been entered in favor of the plaintiffs. These contentions are, of course, based on the factually sound premise that Secretary Romney did not have any knowledge, and could not have had any knowledge, of the comprehensive plan when he approved the conversion-substitution in 1969. Nevertheless, there existed one simple method to establish this premise conclusively — to ask former Secretary Romney, face to face at a deposition, about his knowledge of the comprehensive plan on November 10, 1969.

In its previous opinion remanding this case to the District Court, this Court saw "no objection to plaintiffs' deposing the Secretary if that should be necessary to a determination of whether the Secretary obeyed the statutory mandate concerning the comprehensive plan." **Schicke v. Romney**, supra, at 319. The plaintiffs, of course, contend that this deposition was absolutely nec-

essary for a proper determination by the District Court, but although they attempted to depose former Secretary on three separate occasions during the remand proceedings (Doc. 52, 62 and 71), these attempts were basically ignored by both the defendants and the District Court. Only by taking former Secretary Romney's deposition could there have been the "full inquiry," required by this Court, "to ascertain the basis of the Secretary's action with reference to any comprehensive plan." **Id.**

There is ample authority, to support this Court's express direction permitting the District Court to allow the plaintiffs to depose former Secretary Romney. As in the supporting authorities, it was required that former Secretary Romney be deposed, since he was personally required under Section 1500c to decide the conversion-substitution application and especially since he did not commit his decision to writing at the time. See **Overton Park**, supra, at 420; **Citizens to Preserve Overton Park, Inc. v. Volpe**, 335 F. Supp. 873, 877 (W.D. Tenn. 1972); **D.C. Fed. of Civic Associations, Inc. v. Volpe**, 316 F. Supp. 754, 760-61, n.12 (D.D.C. 1970); **United States v. Northside Realty Association**, 324 F. Supp. 287 (N.D. Ga. 1971). In addition to the above authorities, the fact that George Romney was no longer HUD Secretary during the remand proceedings presumably would have made him more available for such a deposition. It should be remembered that the plaintiffs were willing to take the former Secretary's deposition at a time and place mutually agreed upon by counsel and deponent (Doc. 71).

Although it can be assumed that HUD would have probably objected to the plaintiffs seeking to take the deposition of Mr. Levine, the plaintiffs did not desire to do so, because Secretary Romney was the only authorized decision maker under Section 1500c and it was his knowledge on the comprehensive plan on November 10, 1969 that was at issue. Furthermore, with respect to

Mr. Levine, the plaintiffs submit that they had the right to cross-examine him at trial and were not required to depose him. Therefore, the fact that the plaintiffs were not able to challenge the affidavits of Mr. Levine, since they were denied the opportunity to depose former Secretary Romney, should have had no significance to the District Court.

The plaintiffs also did not seek to take Mr. Levine's deposition because at all times prior to the entering of judgment by the District Court, the plaintiffs believed, based on this Court's opinion, that this time they would be allowed to depose former Secretary Romney. If the plaintiffs knew the District Court was going to reject that requested right, the plaintiffs might have re-considered pursuing Mr. Levine for a deposition. Yet, as in his self-serving affidavits, the plaintiffs believed his credibility and testimony could not be conclusively weighed and judged by the Court by reading a deposition. Therefore, the plaintiffs reiterate their right to cross-examine Mr. Levine at trial and attack his testimony at trial, with the distinct possibility of uncovering evidence favorable to the plaintiffs and detrimental to the defendants regarding the involvement of Secretary Romney.

As the Supreme Court stated in **Poller v. C.B.S.**, 368 U.S. 464, 473 (1961):

> We believe that summary procedures should be used sparingly in . . . litigation where motive and intent play leading roles, the proof is largely in the hands of the (adverse parties), and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which has long been the hallmark of 'even-handed justice'.

Nevertheless, the District Court, Memorandum of Decision (Doc. 73, at p. 10), held that the failure to challenge Mr. Levine's affidavits demonstrated there was no question of fact whether Secretary Romney followed the statute. This finding was contrary to this Court's holding in a similar case, **Subin v. Goldsmith**, 224 F.2d 753, 759-60 (2nd Cir. 1955): "An opponent's failure to file counter affidavits does not in this kind of case compel acceptance as true, facts alleged in movant's affidavits." See also plaintiffs' Opposition to Summary Judgment and Opposition Affidavit (Doc. 63); **Poller v. C.B.S.**, 368 U.S. 464, 473 (1961); **Bozant v. Bank of New York**, 156 F.2d 787, 790 (2nd Cir. 1945). In other words, the District Court held that the plaintiffs were fatally prejudiced by not challenging the affidavits of Mr. Levine, although the Court did not permit the plaintiffs to take Secretary Romney's deposition, which the plaintiffs sought as the one conclusive way to oppose and challenge the affidavits.

It should be noted that the District Court never acted on the federal defendant's Motion for Protective Order to prevent the deposing of former Secretary Romney (Doc. 69), nor did the Court act on the plaintiffs' final motions to compel the deposition of the former Secretary, to default him for failure to appear for his deposition previously and to stay all proceedings until his deposition was taken (Docs. 71, 72). The District Court merely ignored all of the plaintiffs' motions, including the Motion for Summary Judgment (Doc. 70), and granted the Motion for Summary Judgment of the federal defendant, Secretary James T. Lynn. Nevertheless, although only Secretary Lynn had moved for summary judgment, the District Court entered judgments for all defendants, including former Secretary George Romney and the City of Norwalk, almost as if the Court was entering judgment at the conclusion of a trial. The plaintiffs submit that this all-inclusive judgment was erroneous, since

only Secretary Lynn had moved for summary judgment. The District Court expressly entered summary judgment in favor of all defendants in its Judgment of April 3, 1974 (Doc. 74). There is no authority under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.) that a motion for summary judgment by one party, if granted, shall apply to all similar parties. Since former Secretary Romney and the City of Norwalk did not seek judgment, the plaintiffs submit it was erroneous for the Court to enter judgment in their behalf. See Rules 54, 58, F.R.C.P.

CONCLUSION

In summary and conclusion, the plaintiffs respectfully submit that the District Court erred in entering judgment for all defendants, on the basis of the self-serving affidavits of Bernard I. Levine, since the administrative record which was before Secretary Romney has already been found by this Court to have been fatally silent on the vital comprehensive plan aspect and since there has been no proof that Secretary Romney had any knowledge of Mr. Levine's alleged study.

The plaintiffs also submit that it is abundantly clear that Secretary Romney failed to follow the statutory requirements regarding the comprehensive plan and therefore his decision on that aspect must, by definition, be found to have been arbitrary, capricious, an abuse of the discretion delegated to him and not in accordance with the law.

Therefore, his action in approving the conversion-substitution should have been held unlawful and should have been set aside by the District Court. Summary judgment should have properly been entered in favor of the plaintiffs.

Moreover, it is respectfully submitted that the hasty and erroneous disposition of the case on remand is further reflected in the refusal of the District Court to order the deposition of former Secretary Romney and in entering judgment for all defendants, although only Secretary Lynn moved for summary judgment.

Wherefore, the plaintiffs respectfully request this Court to:

(1) Reverse the summary judgments entered in favor of all defendants;

(2) Remand the case to the District Court with the direction that summary judgment be entered in favor of the plaintiffs, or, in the alternative,

(3) Remand the case to the District Court for further proceedings, including the taking of the deposition of former Secretary Romney and trial on the question of the comprehensive plan aspect, if necessary.

Respectfully Submitted,

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(No Appendix is filed per order of this Court, dated June 25, 1974.)